No. 84369-4

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

JACK and DELAPHINE FEIL, husband and wife;
JOHN TONZ and WANDA TONZ, husband and wife;
and THE RIGHT TO FARM ASSOCIATION OF BAKER FLATS,

Petitioners/Appellants,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD, et al., (No 82399-5)

and

DOUGLAS COUNTY, DOUGLAS COUNTY BOARD OF
COMMISSIONERS; WASHINGTON STATE PARKS AND
RECREATION COMMISSION; and
PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, (No.
82400-2)

Respondents.

Consolidated on Appeal

On Petition for Review from Division III of the
Washington State Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION; WASHINGTON FARM BUREAU; ADAMS COUNTY FARM BUREAU; CHELAN-DOUGLAS COUNTY FARM BUREAU; CLARK-COWLITZ COUNTY FARM BUREAU; FRANKLIN COUNTY FARM BUREAU; GRANT COUNTY FARM BUREAU, LEWIS COUNTY FARM BUREAU; MASON-KITSAP COUNTY FARM BUREAU; OKANOGAN COUNTY FARM BUREAU; SKAGIT COUNTY FARM BUREAU; SNOHOMISH COUNTY FARM BUREAU; STEVENS COUNTY FARM BUREAU; THURSTON COUNTY FARM BUREAU; WHATCOM COUNTY FARM BUREAU; WHITMAN COUNTY FARM BUREAU; YAKIMA COUNTY FARM BUREAU; AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

BRIAN T. HODGES
(WSBA No. 31976)
Pacific Legal Foundation
10940 NE 33rd Place
Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565

Attorney for Amici Curiae Pacific Legal Foundation; Washington Farm Bureau; Adams County Farm Bureau; Chelan-Douglas County Farm Bureau; Clark-Cowlitz County Farm Bureau; Franklin County Farm Bureau; Grant County Farm Bureau; Lewis County Farm Bureau; Mason-Kitsap Farm Bureau; Okanogan County Farm Bureau; Skagit County Farm Bureau; Snohomish County Farm Bureau; Stevens County Farm Bureau; Thurston County Farm Bureau; Whatcom County Farm Bureau; Whitman County Farm Bureau; Yakima County Farm Bureau; and Building Industry Association of Washington

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INTRODUCTION

Protecting agricultural practice and resources is a matter of utmost public importance in Washington State. But in *Feil v. Eastern Washington Growth Management Hearings Board*, 153 Wn. App. 394 (2009), Division III of the Court of Appeals held that local government can circumvent State land use policy and Supreme Court precedent prohibiting the conversion of productive agricultural land into public recreational facilities by using a permit process to create a recreational overlay on farmland. The Court of Appeals' decision opens the back door for local governments to convert countless acres of agricultural land into public facilities. And if left unreviewed, the decision has the capacity to unsettle all of the protections that legislators consciously included in the Growth Management Act (GMA) and local comprehensive plans to protect farmland.

Amici curiae, who represent the interests of Washington's agricultural community, property owners, and building community, are very concerned about the loss of productive agricultural lands to state projects and its impact on the viability of Washington's agricultural industry. Amici urge this Court to accept review of the case.

ISSUE ADDRESSED BY AMICI

Whether the Court of Appeals' conclusion that Douglas County's creation of a recreational overlay is not subject to review for compliance with the GMA raises a significant issue of public interest where State land use policy and Supreme Court precedent prohibits local government from converting productive agricultural land into recreational facilities.

SUMMARY OF THE CASE

This appeal arises from several years of litigation between orchardists and trail proponents regarding the government's decision to locate a 5-mile segment of a recreational trail on productive agricultural land in Douglas County. The County's decision to convert agricultural lands to recreational uses was not authorized by its subarea plan. To the contrary, the subarea plan specifically prohibits the conversion of agricultural lands of long-term commercial significance to conflicting recreational uses.[1] *See* Appellants'

[1] Douglas County's Greater East Wenatchee Area Comprehensive Plan adopted policies intended to protect productive agricultural lands from being converted to nonagricultural uses. Appellants' Op. Br. at App. G (Comprehensive Plan at 12-1 through 12-3). The County's Commercial Agriculture designation is intended "to protect lands that meet the criteria for agricultural lands of long-term significance and to protect the primary use of the land as agriculture and agricultural related activities." Appellants' Op. Br. at App. G (Comprehensive Plan at 12-7). And the County included several specific policies in its comprehensive plan that prohibit the conversion of agricultural lands to inconsistent uses:

> A-1 The County will encourage the retention of agricultural lands of long-term commercial significance, including rangelands and will prevent haphazard growth into these areas.

Op. Br. at App. G (Subarea Plan at 12-1) ("Existing and future agricultural activities *are permanent land uses* and provide significant benefit within the community.") (emphasis added). The County circumvented its own prohibition against converting agricultural lands by issuing a permit decision approving the recreational trail and enacting legislation to support approval of the permit. *See* AR 4895-96 ("It is difficult to see how this recreational overlay that allows a trail system to run through the [Commercial Agriculture] district for recreational purposes is not an application for a use that would offend the uses permitted as of right.").

The County's resolution amended its development regulations to allow for the conflicting use of agricultural lands. Douglas County Resolution No. TLS-08-09B (Appellants' Op. Br. at App. B); *see also* Resolution at finding 13 (Resolution constituted both a permit and "an amendment to the development regulation."). Regardless of the fact that the

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A-3. Protect agricultural lands from conflicting non-farm uses and influences.

A-4 [...] Ensure that public policies minimize the disruption of agricultural activities.

A-7 Preserve agricultural tracts that are adequate in size, in relation to the particular activity, to maintain the economic viability of farming activities.

Appellants' Op. Br. at App. G (Comprehensive Plan at 12-3 through 12-4).

County's decision began in response to a permit application, it ended with a legislative act authorizing the State Department of Transportation and State Parks and Recreation Commission to put productive agricultural land to nonagricultural, conflicting use: constructing a new bicycle and pedestrian trail by removing acres of existing fruit trees and limiting agricultural uses and practices both on and in proximity to the trail (*e.g.*, removing honey bees, limit spraying, limit ability of farm equipment to access bisected orchards, expose trees to frost damage). Pet. Rev. at 6-7. The petitioners contend that a legislative act that makes such a dramatic change in land use policy must be subject to review for compliance with the GMA.

ARGUMENT WHY REVIEW SHOULD BE GRANTED

I

ALLOWING THE STATE TO CONVERT AGRICULTURAL LANDS INTO RECREATIONAL FACILITIES THREATENS FARMS ACROSS THE STATE AND RAISES AN ISSUE OF SIGNIFICANT PUBLIC INTEREST

Under normal conditions, Washington's agricultural industry operates with low profit margins. Government intrusion onto land designated for agricultural use threatens the viability of ongoing agricultural activities by lowering profit margins and increasing production costs. *See* Richard L.

Settle, *Symposium: Revisiting the Growth Management Act: Washington's Growth Management Revolution Goes to Court*, 23 Seattle U. L. Rev. 5, 22 (1999) ("Allowing conversion of resource lands to other uses, or allowing incompatible uses nearby, impairs the viability and productivity of resource industries."). Protecting our remaining agricultural resources from unnecessary government intrusion is a matter of utmost public importance in Washington State. *See King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 555-59 (2000); Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 Puget Sound L. Rev. 869, 896 (1993) (The GMA establishes the State's policy toward important land use issues, including agricultural lands.).

The GMA seeks to protect Washington's agricultural industry by mandating that local governments adopt comprehensive plans providing for the conservation and enhancement of farmlands, and assuring that the use of adjacent lands will not interfere with continued agricultural uses. *King County*, 142 Wn.2d at 556 (citing RCW 36.70A.060(1)); *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 48 (1998) (citing Gary Pivo, *Is the Growth Management Act Working? A Survey of*

Resource Lands and Critical Areas Development Regulations, 16 U. Puget Sound L. Rev. 1141, 1145 (1993)). As a matter of statewide land use policy, a farmer's right to preserve his or her land for agricultural purposes trumps the public desire to build new recreational facilities. *King County*, 142 Wn.2d at 562 ("[N]othing in the Act permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture."). The Court of Appeals' decision undermines this well-established policy.

A. The Court of Appeals' Decision Enables Local Government's Piecemeal Conversion of Agricultural Lands into Recreational Facilities

The Court of Appeals' holding that a local government can use a permit process to create a recreational overlay on farmland is contrary to State land use policy as adopted in the GMA and the *King County* decision, both of which prohibit the conversion of productive agricultural land into public recreational facilities. *Feil*, 153 Wn. App. at 409-11. This decision is of real concern to Washington's farmers given the fact that agricultural land is frequently targeted for conversion into public and recreational facilities. *See, e.g., King County*, 142 Wn.2d at 562-63 (disapproving County plan to authorize conversion of agricultural lands into soccer fields). Indeed, the trail at issue in this case is one small part of a larger plan to develop a

statewide system of recreational trails.[2] The trail project is not unique. The City of Bainbridge Island, for example, is considering developing recreational trails on government-owned agricultural lands.[3] Conflicts between agricultural and recreational uses are brewing elsewhere in the State. In Snohomish County, Washington's Department of Fish and Wildlife submitted a permit application (styled as an application for a setback variance to move existing dikes inland) to flood 110 acres of leased agricultural lands on Leque Island with salt water to create a salt marsh park with a bicycle/hiking trail circling the island.[4] Given the importance that our State has placed on the conservation of agricultural lands and the real likelihood that these same issues will recur, this Court should accept review of this case.

B. The Court of Appeals' Decision Creates a

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[2] Washington State Parks and Recreation Commission Trail Goals and Policies (*available at* http://www.parks.wa.gov/plans/recandconservation/RCO%20Plan%20Appendix%204%20Trail%20Goals%20and%20Policies.pdf (last visited May 18, 2010).

[3] *See* American Farmland Trust, *An Assessment and Recommendations for Preservation and Management of City-Owned Agricultural Land* at 6, 10, 19, 27 (2005) (*available at* http://www.farmland.org/programs/states/documents/BainbridgeFullReport.pdf) (last visited May 18, 2010)).

[4] Jeremiah O'Hagan, New obstacle in Leque Island plans, Stanwood/Camano News (Jan. 26, 2010) (*available at* http://www.scnews.com/news/2010-10-26/General_News/New_obstacle_in_Leque_Island_plans.html) (last visited May 18, 2010).

Loophole That Allows Local Government To Make Land Use Policy Decisions Without Demonstrating Compliance with the GMA's Agricultural Policies

Requiring that a local government adhere to mandatory statewide land use policy regarding agricultural lands is a matter of significant public importance because it is the only way to assure that policies will actually be implemented. As early legal commentators noted, the only way to assure that local government is adhering to the GMA's agricultural policies is to allow citizens to litigate petitions alleging noncompliance with the GMA before the growth boards. Settle, *supra*, 23 Seattle U. L. Rev. at 11 ("[L]ocal fidelity to GMA goals is not systematically enforced, but depends upon appeals to the Growth Boards and the courts."); Derek W. Woolston, *Simply a Matter of Growing Pains? Evaluating the Controversy Surrounding the Growth Management Hearings Boards*, 71 Wash. L. Rev. 1219, 1252 (1996) ("If the GMA is truly a statewide effort to implement consistent land use and resource management policies . . . then compliance is essential.").

By characterizing Douglas County's recreational overlay resolution as a "permit decision," the Court of Appeals created a loophole that exempts local government from compliance with the protections included in the GMA and local comprehensive plans that are aimed at protecting agricultural lands.

Contra Woods v. Kittitas County, 162 Wn.2d 597, 610 (2007) (Only "project permits" authorized by the comprehensive plan are exempt from review for compliance with the GMA). As a matter of sound public policy, a legislative act that creates a recreational overlay district *contrary* to the policies and goals of the comprehensive plan must be considered an amendment to the plan and held subject to review for compliance with the GMA.[5] Otherwise, the policies and goals of the GMA will be rendered meaningless. This Court should accept review of this petition to assure that *Feil* is not used to create a loophole that will allow the incremental and piecemeal conversion of agricultural lands into recreational facilities.

CONCLUSION

This appeal is *not* about whether a site specific permit is subject to review under the GMA. Instead, this appeal asks whether a legislative act amending a local government's development regulations to allow uses inconsistent with those allowed by its comprehensive plan is subject to review for compliance with the GMA. The answer to that question is yes. The Court of Appeals' decision is particularly appropriate for review because

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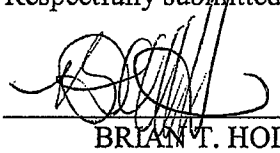
[5] RCW 36.70A.280; RCW 36.70A.290; *see also Vinatieri v. Lewis County*, WWGMHB No. 03-2-0020c, 2004 GMHB LEXIS 45, at *9 (Final Decision and Order, May 6, 2004) (Reviewing changes made by resolution to a local government's development regulations.).

it opens the door to limitless, ad hoc conversion of productive agricultural lands into public recreational facilities. Left unreviewed, the Court of Appeals' decision has the capacity to render this Court's prior decision in *King County* meaningless, and to undermine the State's well-established policy of preserving and enhancing the agricultural industry. Amici curiae respectfully request that this Court grant the petition for review.

DATED: May 20, 2010

Respectfully submitted,



BRIAN T. HODGES
(WSBA No. 31976)

Attorney for Amici Curiae
Pacific Legal Foundation; Washington Farm Bureau; Adams County Farm Bureau; Chelan-Douglas County Farm Bureau; Clark-Cowlitz County Farm Bureau; Franklin County Farm Bureau; Grant County Farm Bureau; Lewis County Farm Bureau; Mason-Kitsap Farm Bureau; Okanogan County Farm Bureau; Skagit County Farm Bureau; Snohomish County Farm Bureau; Stevens County Farm Bureau; Thurston County Farm Bureau; Whatcom County Farm Bureau; Whitman County Farm Bureau; Yakima County Farm Bureau; and Building Industry Association of Washington

DECLARATION OF SERVICE

I, BRIAN T. HODGES, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington.

On May 20, 2010, true copies of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ET AL,. were sent via email and placed in envelopes and sent by First Class United States Mail addressed to the following:

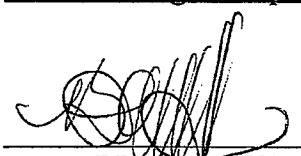
For Petitioners:
Robert C. Rowley
James J. Klauser
Rowley & Klauser, LLP
557 Roy Street, Suite 160
Seattle, WA 98109
rcrowley59@comcast.net
jklauser@speakeasy.net

For Douglas County:
Steven Clem
Douglas County Pros. Atty.
P.O. Box 360
Waterville, WA 98858-0360
sclem@co.douglas.wa.us

For WSDOT:
Stephen Klasinski
Attorney General of Washington
7141 Clearwater Drive SW
P.O. Box 40113
Olympia, WA 98504-0113
stephenk@atg.wa.gov

For Parks & Recreation:
James Schwartz & Matthew Kernutt
Attorney General of Washington
1125 Washington St. SE
P.O. Box 40100
Olympia, WA 98504-0100
jims@atg.wa.gov
mattk1@atg.wa.gov

For Chelan PUD:
Carol A. Wardell
PUD Dist. No. 1 of Chelan County
P.O. Box 1231
327 N. Wenatchee Ave.
Wenatchee, WA 988-7-1231
carol.wardell@chelanpud.org



BRIAN T. HODGES
(WSBA No. 31976)